

**Electronic Evidence  
2010 Juvenile Defender  
Conference  
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**Introduction**

- How electronic evidence may come into play in a juvenile proceeding
  - Facebook and other social networking sites
  - Emails
  - Internet web pages or postings
- Defending against the introduction of electronic evidence
- Offensively using electronic evidence

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**Facebook and Other OSN's**

- Americans now spend more time on OSN's than they do on email. (LA Times, Aug. 3, 2010).
- Over 300 million people are on Facebook, and about 125 million use MySpace.
- Changes in Facebook default privacy settings mean that everyone can see your data unless you have affirmatively changed your settings: <http://www.wordstream.com/articles/google-privacy-internet-privacy>



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### Courts are ordering discovery of OSN information.



- EEOC v. Simply Storage, No. 1:09-CV-1223-WTL-DML (SD Ind. May 11, 2010) (ordering limited discovery of FB profiles, postings, messages, photographs, etc. in sexual harassment suit)
- Mackelprang v. Fidelity National, No. 06-788, 2007 WL 119149 (D. Nev. 01/09/07) (denying motion to compel broad consent letter from P to MySpace but leaving open some discovery of messages relating to topics at issue)
- Beye v. Horizon, No. 06-5377 (D. N.J. Order 12/14/07) (in consolidated cases relating to insurance coverage for eating disorders, ordering producing of entries on all web pages such as FB and MySpace which the minors shared with other and concerning their eating disorders)

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### Some Ways in Which Internet Postings Have Been Used in Evidence

- Obstructing justice case: be careful who your "friends" are. <http://www.dailyillini.com/news/2006/08/01/student-arrested-after-police-facebook-him>



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### Some Ways in Which Internet Postings Have Been Used in Evidence (cont'd)

- Personal injury claim: be careful what you post.
- Sedie v. US, No. C-08-04417, 2010 WL 1644252 (ND Cal. Apr. 21, 2010) (allowing evidence from plaintiff's Facebook and MySpace accounts to dispute personal injury claims).



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### Some Ways in Which Internet Postings Have Been Used in Evidence (cont'd)

- High school brawling cases: be careful what your friends post.
  - Police have made arrests based on YouTube videos of students fighting in Alabama, Indiana, Ohio, New York and Virginia.



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### Some Ways in Which Internet Postings Have Been Used in Evidence (cont'd)

- Termination of parental rights case: be careful what your children post.
  - *In re S.A.*, No. 10-0203, 2010 WL 1881524 (Iowa Ct. App. May 12, 2010) (Child's use of inappropriate language on FB after midnight offered as proof of a lack of parental supervision).



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### Admissibility of Electronic Evidence

1. Relevance
2. Authenticity
3. Hearsay
4. Best evidence
5. Prejudice



A very good source: *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007)

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## 1. Relevance – Rule 401

- Issue of identity
  - Problem when it's not clear who made an online comment, posted information online, or sent an email.
  - Without a basis for tying the evidence to the individual in question, the evidence is arguably irrelevant.
- Courts should admit evidence under 104(a) subject to a showing that the evidence is connected to the particular individual.

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## 2. Authenticity: Rules 901 and 902

- 901(a): "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."
- 901(b) includes illustrations conforming with the rule.
  - (1) Testimony of a witness with knowledge
  - (4) Distinctive characteristics and the like
  - (7) Public records and reports
  - (9) Process or system

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## Authentication of emails



- 901(b)(1): testimony of a witness who sent or received the emails
- 901(b)(4): authentication based on "appearance, contents, substance, internal patterns, or other distinctive characteristics" -- like the name of a business appearing in an email address, or other circumstantial evidence
- US v. Safavian, 435 F. Supp. 2d 36 (DDC 2006) (authenticating email based on email addresses containing the name of the sender or recipient; content also authenticates email as being from particular person.)
- The argument that the emails are not trustworthy because of forwarding, etc "is more appropriately directed to the weight the jury should give the evidence, not to its authenticity."

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### Authentication of Photographs

- Proponent of photo:
  1. Witness familiar with object or scene in photo
  2. Witness explains the basis for his familiarity
  3. Witness recognizes the object or scene in photo
  4. Photo is a fair, accurate depiction of the object or scene at relevant time.
- Opponent of photo:
  - Are there aspects of the photo the witness cannot identify?
  - Is the witness unable to identify the date of the photo?
  - Does the photo appear to be altered or manipulated?



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### Authentication of Videos

- Proponent of video
  - Ideally, offer testimony of witness who made the video, or who was present at the scene
  - Witness should verify location, date and time
  - Witness should testify that the video accurately depicts the actual events, and has not been altered
- Opponent of video
  - Is there a chain of custody issue?
  - Is there a lack of information about location, date or time?
  - Is the quality of the video questionable?
  - Has the video been selectively edited?



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### Authentication Examples from Case Law

- US v. Jackson, 208 F.3d 633 (7<sup>th</sup> Cir. 2000) (excluding website postings the defendant sought to introduce to show that hate mail came from online supremacist groups and not the defendant; defendant did not establish prima facie case that the postings were actually made by the white supremacist groups, as opposed to being posted by the defendant herself, a skilled computer user; postings also hearsay not admissible as business records of the ISP)
- US v. Tank, 200 F.3d 627 (9<sup>th</sup> Cir. 2000) (upholding admission of chat room log printouts where witness testified how he created the printouts and that they accurately reflected the chat room conversations; government also established connection between the printouts and the defendant, who admitted to using the screen name)

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### 3. Hearsay



- Hearsay: is it an out-of-court statement being offered for the truth of the matter asserted?
  - If so, you need an exception.
- Relevant exceptions:
  - Admission of a party-opponent under 801(d)(2)
  - Business records under 803(6) or public records under 803(8)
  - Present sense impression under 803(1)
  - Excited utterance under 803(2)
  - State of mind under 803(3)

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### Hearsay Case Law

- United States v. Salgado, 250 F.3d 438 (6th Cir. 2001) (upholding admission of computer printouts of telephone toll records as business records)
- State v. Craycraft, 2010 WL 610601 (Ohio App. 12 Dist. 2010) (Instant messages sent by D admissible as admissions)
- In the Matter of K.W., 666 S.E.2d 490 (N.C. Ct. App. 2008) (evidence of minor's MySpace page admissible for impeachment purposes as prior inconsistent statement, but improper exclusion harmless; not admissible as substantive evidence)

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### 4. Best Evidence Rule



- When a party is trying to prove the contents of a writing, recording or photograph, the proponent must introduce the original. (1002)
- 1001(3): An "original" of a photograph includes the negative or any print therefrom.
- 1001 (3): If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

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## 5. Rule 403: Probative value v. prejudicial effect

- “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”
- Often comes into play when the evidence is inflammatory
- Is also very important in the area of computerized animation to illustrate how something happened.
- See *Bowoto v. Chevron Corp.*, No. C99-02506, 2006 WL 1627004 (N.D. Cal. Jun. 12, 2006) (excluding computer model under 403 because of its inaccurate representation of a barge's deck).



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## Conclusion

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